

**BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD**

In the Matter of:

VIRGIL T. REEDY AND OTHERS
(Claimants)
(See Appendix)

PRECEDENT
BENEFIT DECISION
No. P-B-16
Case No. 68-97

S.S.A. No. _____ and Others
(See Appendix)

PERINI YUBA ASSOCIATES
(Employer)

Employer Account No.

Prior to the issuance of the referee's decisions in the above listed cases, we assumed jurisdiction under section 1336 of the Unemployment Insurance Code.

The employer made a timely appeal to a referee from determinations and rulings of the Department of Employment which held, as to each claimant, that the claimant is not disqualified for benefits under section 1256 of the code and that the employer's account is not relieved of benefit charges under section 1032 of the code.

The cases were consolidated for hearing and decision under the provisions of section 5032 of Title 22 of the California Administrative Code and are consolidated for argument, consideration, and decision by this board under section 5107 of the same code.

The Department of Employment has submitted written argument, and all claimants, through their attorney, have adopted it as their own. Although afforded the opportunity, the employer has not responded to the written argument.

(See Appendix)

REV

STATEMENT OF FACTS

The claimants were all members of the United Association of Journeymen, Plumbers and Pipefitters, Local No. 228 (hereinafter referred to as the union). They were all employed by the above employer on a dam construction site at Bullard Bar, California. Jurisdictional disputes had arisen and there were some complaints among the employees as to safety conditions. The grievances had been presented to management by the business manager of the union. When these were not resolved as promptly as the business manager felt they should be, he called for a picket line to be established at the work site on the morning of August 3, 1967. All of the twenty union members employed, including all the claimants herein, participated in the picketing and none reported to their work stations on that day.

There was an existing collective bargaining agreement between the union and the employer, which provided in pertinent part:

"ARTICLE X

"Cessation of Work

"It is mutually understood and agreed that during the period when this Agreement is in force and effect neither the Employer nor any Individual Employer will authorize or engage in any lockout; and that the Union or Local Union will not authorize any strikes, picketing, slowdowns or stoppages of work, in any dispute, complaint or grievance arising under the terms and provisions of this Agreement"

Article XII, entitled Jurisdictional Disputes, prescribes an arbitration procedure for resolving any disputes as to the jurisdiction over work to be performed and provides that the decisions reached under these procedures are binding on all parties. It further provides: "There shall be no slowdown or stoppage of work as the result of any such dispute."

The complaints concerning the jurisdictional questions had been brought to the personal attention of the labor relations manager of the employer on August 2, and he was still in the process of investigating them when he learned of the picket line. That afternoon he advised the union business manager that he was discharging the men involved for their conduct in violation of the labor agreement and was ordering the union to dispatch sixteen different pipefitters to report the following morning. He also left instructions with the foremen of the men involved that they were not to be allowed to return to their jobs.

The picket line was removed at the end of the work shift upon advice of a union attorney. A meeting of the Area Trade Council, composed of membership from the unions representing the various crafts in the locale, was called for that evening in an effort to obtain that group's sanction for a strike. When the council refused to endorse the strike action, the business manager abandoned plans for future action and instructed the employees of his local to return to work the following morning.

All the claimants reported for work as instructed on August 4. They were not permitted to resume their duties, and, as soon as the paper work could be completed, were given written notice of their discharge.

The project on which the claimants worked was under a \$142,000,000 contract and provided employment for 800 workers in various trades and crafts. The contract contains a completion schedule and the employer is subject to a daily penalty of \$25,000 for every day beyond June 1, 1970 that it takes to complete the project. At the time of the incidents involved herein, the company was considerably behind schedule.

The job site is an isolated area which can be reached only by means of a single narrow, twisting, 40-mile road through the mountains. The confusion caused by the picket line snarled the traffic to the site and created a dangerous condition for the suppliers,

contractors and employees using the road. Most of the workers of the other trades elected to respect the picket line, with the result that nothing could be accomplished during the time that the picket line operated and it was also necessary to shut down operations for the following shift. The construction effort was substantially hampered on August 4 as well because of the confusion over the status of the strike.

REASONS FOR DECISION

Section 1262 of the Unemployment Insurance Code provides as follows:

"1262. An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

The term trade dispute is not defined in the code. In our view, the legislature intended that it should be given a broad application and that the provisions of section 1262 are meant to apply to any period of unemployment directly resulting from a controversy which is reasonably related to the terms or conditions of employment and to the purposes of collective bargaining.

In the instant case, the points of disagreement - jurisdictional matters and safety standards - are matters commonly resolved by collective bargaining, and it is apparent that the short-lived strike and picket line was an effort on the part of the employees, acting in concert, to enforce their demands through the means of these economic weapons. The initial leaving of the claimants from their work was, therefore, a result of a trade dispute, and section 1262 was applicable for the period such trade dispute was in active progress.

The claimants have not claimed benefits for the day that they did not work because of their activities on the picket line. The issue to be resolved, therefore, is whether, in view of the "no-strike" provision in the collective bargaining agreement, the participation in the trade dispute can be considered misconduct under the provisions of sections 1256 and 1030 of the code.

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges, if the claimant has been discharged for misconduct connected with his most recent work.

The California District Court of Appeals in Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 P. 2d 947, held that the term "misconduct," as it appears in section 1256, is limited to conduct which shows wilful or wanton disregard of the employer's interest, such as (1) deliberate violations of or deliberate disregard of the standards of behavior which the employer had a right to expect of his employee; or (2) carelessness or negligence of such degree or recurrence as to show wrongful intent or evil design.

The thrust of the written argument presented by the Department of Employment and adopted by the claimants is that the provisions of sections 1256, 1030, and 1032 of the code do not apply where, as here, the termination of employment results solely because of the claimants' involvement in a trade dispute. It is urged that to hold otherwise would require the department initially, and this board ultimately, to decide the merits of trade disputes and thus shed the cloak of neutrality in matters involving labor relations which, it says, is placed on administrative agencies by the legislature by enactment of section 1262 of the code.

It is urged that the decision of the California Supreme Court in the case of W. R. Grace and Company v. California Employment Commission (1944), 24 Cal. 2d 720,

151 P. 2d 215, requires such a result. We do not agree that it does.

In the Grace case, the court dealt with a different problem than is presented here. There, the claimants had filed a claim for benefits for the period during which the trade dispute was in active progress. The California Employment Commission, the predecessor to this board, had held that the claimants could certify during the period of the dispute and thereby serve the required waiting period. It had concluded this could be done since the employer was at fault in the controversy.

The Supreme Court, in rejecting the position of the Commission, stated as follows:

" . . . the disqualification imposed by section 56(a) [now section 1262 of the code] is not contingent upon the merits of the controversy nor was it intended that the Commission should become an arbitrator of industrial disputes. The Commission therefore exceeded its power when it determined the merits of the dispute in the present case and awarded benefits or credit for the weeks of waiting period on the basis of that determination."

It should be noted that in that case the court was only concerned with the claimant's right to effectively certify for benefits during the progress of the trade dispute. Section 56(a) (now section 1262) reflects a clear intent on the part of the legislature that, with respect to the actual period of industrial conflict, individuals who left their work because of a dispute are not eligible to qualify for benefits. We do not understand the court in the Grace case to say more than that. Further, we find nothing in that case which would answer the question whether the so-called neutrality policy towards industrial disputes applies where, as in the present case, the parties have voluntarily bargained away their right to resolve such disputes by the usual weapons of collective bargaining - the strike and the picket line.

The courts of other jurisdictions have divided on whether a violation of a "no-strike" clause in a collective bargaining agreement resulting in the termination of employment is grounds for disqualification under statutes similar to section 1256 of our code.

The New York Court of Appeals, with two members dissenting, has held that mere participation in a strike cannot be used as a basis for disqualification of a claimant for a period subsequent to the time the dispute is ended even though he was a party to a "no-strike" agreement (Matter of Heitzenrater (1966), 19 N.Y. 2d 1, 7-8, 27 N.Y.S. 2d 633, 638-639). The Supreme Court of Alabama has taken a similar view (T. R. Miller Mill Co. v. Philip Johns (1954), 261 Ala. 615, 620 75 S. 2d 675, 679-680).

On the other hand, the courts of the states of Pennsylvania, New Jersey and Wisconsin have held that participation in a strike, in violation of a "no-strike" agreement, is misconduct and grounds for disqualification (Yellow Cab Co. of Philadelphia v. Board of Review (1952), 170 Pa. Super. 625, 90 A. 2d 599; American Viscose Corp. v. Board of Review (1953), 173 Pa. Super. 251, 98 A. 2d 257; Bogue Electric Co. v. Board of Review (1956), 21 N.J. 431, 122 A. 2d 615); Streeter, et al. v. Industrial Comm. (1955), 269 Wis. 412, 69 N.W. 2d 573).

The Supreme Court of the United States in Atkinson v. Sinclair Refining Co. (1962), 370 U.S. 238, 246, 82 S. Ct. 1318, stated as follows:

"It is universally accepted that the no-strike clause in a collective bargaining agreement at the very least establishes a rule of conduct or condition of employment the violation of which by employees justifies discipline or discharge."

In the instant case, the evidence is uncontroverted that the claimants were parties to an agreement by virtue of which their right to strike and picket had been

bargained away in return for the employer's agreement not to use the "lockout" as a means of resolving industrial disputes. The agreement was obviously the result of a mutual desire on the part of the union and employer alike to substitute more peaceable means for the resolution of differences through an arbitration procedure. We recognize the desirability of such agreements to avoid industrial strife and we believe that where the parties have so contracted a failure to use the arbitration procedure in favor of a resort to breach of the no-strike clause raises a rebuttable presumption of misconduct.

Under these circumstances, we are persuaded that we are not required to observe a "hands off" policy and indeed would be abdicating our responsibilities under the Unemployment Insurance Code if we were not to evaluate this conduct in determining the claimants' entitlement to benefits and the question of whether the employer's account is chargeable. The board is not judging the merits of the dispute, but is determining under section 1256 of the code the conduct that gave rise to the termination.

In the instant case, on the merits there can be little question that the claimants, by virtue of the collective bargaining agreement, owed a duty to the employer to refrain from engaging in the type of activities which occurred on August 3. The evidence is also clear that all the claimants herein wilfully violated that duty on the date in question by participating in the unauthorized strike and picket line and that the employer suffered substantial injury as a result. The loss of employment was a predictable, direct consequence of this breach of duty. It follows, therefore, that the claimants' unemployment commencing with their discharge on August 4 was a result of misconduct connected with their work.

DECISION

The determinations and rulings of the Department of Employment are reversed. All claimants herein are disqualified for benefits under section 1256 of the code

and in each case the employer's account is relieved of benefit charges.

Sacramento, California, May 29, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

LOWELL NELSON

JAMES M. SHUMWAY (Not Voting)

JOHN B. WEISS